

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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GERARDO PEREZ,

Plaintiff,

v.

JENNIFER NASH, *et. al.*,

Defendants.

Case No. 2:21-cv-00075-RFB-MDC

ORDER

Before the Court is the Motion for Summary Judgment by Defendants Gregory Bryan and Jennifer Nash. (ECF No. 163). For the following reasons, the Motion is denied.

I. PROCEDURAL HISTORY

On January 14, 2021, Plaintiff Gerardo Perez, who was imprisoned by the Nevada Department of Corrections (“NDOC”), filed his complaint *pro se*, pursuant to 42 U.S.C. § 1983. (ECF No. 1). On May 13, 2021, after mandatory screening, the Court allowed Plaintiff’s complaint for deliberate indifference to a serious medical need under the Eighth Amendment to proceed against Defendants Dr. Gregory Bryan and Jennifer Nash, NDOC employees who were involved in Plaintiff’s medical treatment while housed at High Desert State Prison (“NDOC Defendants”). (ECF No. 23). Plaintiff claims arising from his medical treatment while housed in prison facilities in Arizona were also allowed to proceed. Those claims were brought against Defendants who worked for CoreCivic (“CoreCivic Defendants”), the entity that contracted with NDOC to house Plaintiff in Arizona.

On March 21, 2023, NDOC Defendants filed a Motion for Summary Judgment. (ECF No. 122). On June 30, 2023, Plaintiff filed a Motion for Appointment of Counsel. (ECF No. 140). On

1 July 6, 2023, the Court granted Plaintiff's Motion and stayed the case pending appointment of
2 counsel. (ECF No. 142). January 24, 2024, *pro bono* counsel James Urrutia was appointed to
3 represent Plaintiff. (ECF No. 151). Mr. Urrutia appeared on behalf of Plaintiff on February 8, 2024.
4 (ECF No. 152). On February 16, 2024, the Court denied the NDOC Defendants' Motion for
5 Summary Judgment (ECF No. 122) without prejudice and ordered the parties to meet and confer
6 to enable Plaintiff's counsel to familiarize himself with the case and to propose a new scheduling
7 order. (ECF No. 153). On March 4, 2024, CoreCivic Defendants filed a Motion to Dismiss. (ECF
8 No. 155). On March 5, 2024, the Court granted the parties' joint proposed Scheduling Order, with
9 a discovery deadline of August 28, 2024, and a dispositive Motion deadline of September 27, 2024.
10 (ECF No. 156). On May 17, 2024, the Court granted CoreCivic Defendants' motion to stay the
11 case as to them, pending resolution of their (ECF No. 155) Motion to Dismiss. (ECF No. 162).

12 On June 7, 2024, NDOC Defendants filed the instant Motion for Summary Judgment,
13 based solely the issue of whether Plaintiff adequately exhausted his administrative remedies
14 pursuant to the Prison Litigation Reform Act ("PLRA"). (ECF No. 163). The Motion was fully
15 briefed. (ECF Nos. 166-168). NDOC Defendants also filed a Motion to Stay the case pending the
16 Court's decision on summary judgment, which Plaintiff did not oppose. (ECF Nos. 164-165).

17 On January 27, 2025, the Court was advised that Plaintiff had been paroled.

18 On February 19, 2025, the Court held a hearing on the CoreCivic Defendants' (ECF No.
19 155) Motion to Dismiss, the NDOC Defendants' (ECF No. 163) Motion for Summary Judgment,
20 and the NDOC Defendants' (ECF No. 164) Motion to Stay. At the hearing, the Court granted the
21 CoreCivic Defendants' Motion to Dismiss without prejudice and granted Plaintiff leave to amend
22 his complaint. (ECF No. 176). The Court also granted the NDOC Defendants' Motion to Stay
23 pending the Court's decision on the summary judgment as to NDOC, *nunc pro tunc*. *Id.* The Court
24 took the NDOC's summary judgment motion under advisement. *Id.* The Court's Order on NDOC's
25 Motion for Summary Judgment on exhaustion follows.

26 On March 7, 2025, Plaintiff filed an Amended Complaint which added additional NDOC
27 Defendants including NDOC caseworker and contract monitor Robert J. Mears, NDOC registered
28 nurse Patricia Smith, NDOC medical provider Dr. Aranas, and NDOC correctional officer Perez.

1 (ECF No. 177).

2 3 **II. FACTUAL BACKGROUND**

4 **A. Undisputed Facts**

5 The Court finds the following facts relevant to whether Plaintiff sufficiently exhausted his
6 administrative remedies under the PLRA to be undisputed.

7 NDOC provides an administrative grievance procedure for inmates, Administrative
8 Regulation (“AR”) 740. AR 740 requires NDOC inmates to exhaust three levels of grievance
9 procedure: the informal level, a first level appeal, and a second level appeal. If a response is
10 overdue, an inmate can proceed to the next level of appeal.

11 On April 19, 2020, while housed at the Saguro Correctional Center in Arizona, Plaintiff
12 filed an informal grievance number 2006-31-2129 regarding NDOC’s denials of medical care
13 relating to his back injuries. The grievance stated NDOC had known of Plaintiff’s injuries, and the
14 fact that he had been receiving medical treatment for said injuries prior to his incarceration, since
15 the time he was initially arrested and detained at the Clark County Detention Center. The grievance
16 described the manifestation of symptoms relating to his back injuries including pain down his right
17 leg and loss of feeling from the waist down on his right side, which he had been experiencing for
18 about two years. The grievance detailed the fact that a CoreCivic medical provider, Dr. Hagmann,
19 had requested Plaintiff receive an MRI and stronger medication, but those requests had been denied
20 by “contract Monitor Robert J. Meares, the NDOC and the NODC Directors.” The grievance asked
21 that his medical history and records be reviewed, as they would show the lack of medical care
22 Plaintiff had been provided no matter the severity of his pain.

23 The 2006-31-2129 grievance was denied. Plaintiff signed the denial on June 22, 2020, and
24 indicated he disagreed with the denial.

25 Plaintiff was transferred from Arizona to High Desert State Prison on November 27, 2020.

26 **B. Disputed Facts**

27 The parties dispute the following facts relevant to whether Plaintiff exhausted his
28 administrative remedies under AR 740.

1 In a declaration, Plaintiff swore that he kept track of his 2006-31-2129 using a mini
2 calendar he had in his possession. After approximately sixty (60) days, he had received no response
3 to his informal grievance, so Plaintiff filled out a “First Level Grievance” form, and handed it to
4 CoreCivic Defendant caseworker Carlos Narvaez at Saguro Correction Center, who told him it
5 would be mailed to NDOC. After another 60 days, Plaintiff filled out a Second Level Grievance
6 form and again handed to Defendant Narvaez, who said it would be mailed to NDOC. After another
7 60 days, Plaintiff wrote a letter to Robert Mears, stating he had not received a response to his
8 Second Level Grievance.

9 The grievance history report for Plaintiff, covering the time period from January 1, 2018
10 to March 3, 2024, does not include the First Level and Second Level grievances that Plaintiff states
11 he filed while still housed at CoreCivic. Plaintiff therefore disputes the accuracy of Defendants’
12 grievance history report.

13 Plaintiff also submitted documentation, reportedly obtained from his Arizona medical
14 records, reflecting that on November 28, 2020, the day after Plaintiff was transferred from Arizona
15 to High Desert State Prison, Plaintiff filed a first level appeal of grievance 2006-31-2129 on
16 November 28, 2020, which stated that the 45 days allowed for NDOC to respond to his first level
17 grievance, which he filed approximately on June 24, 2020, had passed, and Plaintiff still had not
18 received proper medical treatment due to NDOC denying requested treatment while Plaintiff was
19 housed in Arizona. Plaintiff’s documentation reflects a response signed by Plaintiff on August 18,
20 2021, which rejected Plaintiff’s first level appeal for failure to attach the denial of his informal
21 grievance, pursuant to AR 740.08 number 40(5). This documentation is not reflected in the
22 grievance history report provided by NDOC.

23 Plaintiff also submitted documentation reflecting that on August 26, 2021, Plaintiff filed a
24 second level grievance form which stated that his first and second level grievances had not yet
25 been responded to. Plaintiff’s documentation reflects a response signed by Plaintiff on September
26 23, 2021, rejecting his second level grievance for failure to attach supporting documents including
27 “all previously submitted grievance(s) which include Official Response(s) under this grievance
28 log number, and all Improper Grievance Memo(s) under this grievance log number . . .” This

1 documentation is not reflected in the grievance history report provided by NDOC.

2 Plaintiff disputes the accuracy of NDOC's recordkeeping regarding Plaintiff's grievances
3 because the above described first and second level grievance appeals are not included in NDOC's
4 grievance history report.

5 6 **III. LEGAL STANDARD**

7 Summary judgment is appropriate when the pleadings, depositions, answers to
8 interrogatories, and admissions on file, together with the affidavits, if any, show "that there is no
9 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."
10 Fed. R. Civ. P. 56(a); accord Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

11 When considering the propriety of summary judgment, the court views all facts and draws
12 all inferences in the light most favorable to the nonmoving party. Gonzalez v. City of Anaheim,
13 747 F.3d 789, 793 (9th Cir. 2014). If the movant has carried its burden, the nonmoving party "must
14 do more than simply show that there is some metaphysical doubt as to the material facts . . . Where
15 the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,
16 there is no genuine issue for trial." Scott v. Harris, 550 U.S. 372, 380 (2007) (alteration in original)
17 (internal quotation marks omitted). Where a genuine dispute of material fact exists, however, the
18 court will assume the version asserted by the non-moving party. See Bryan v. MacPherson, 630
19 F.3d 805, 823 (9th Cir. 2010); Coles v. Eagle, 704 F.3d 624, 629 (9th Cir. 2012) ("We must, in the
20 context of summary judgment, resolve this disputed factual issue in favor of [the non-moving party
21 and] draw all reasonable inferences in his favor").

22 It is improper for the Court to resolve genuine factual disputes or make credibility
23 determinations at the summary judgment stage. Zetwick v. Cty. of Yolo, 850 F.3d 436, 441 (9th
24 Cir. 2017) (citations omitted).

25 26 **IV. DISCUSSION**

27 The Court now turns to the merits of the pending Motion for Summary Judgment. NDOC
28 defendants argue that Plaintiff has failed to establish a genuine issue of material fact as to

1 Plaintiff's failure to exhaust his administrative remedies under AR 740. As detailed below, the
 2 Court finds that Plaintiff has established a genuine dispute of material fact as to whether he fully
 3 exhausted his administrative remedies under AR 740, and as to whether the AR 740 procedures
 4 were effectively unavailable to him.

5 Additionally, the Court finds that because Plaintiff filed an amended complaint after he
 6 was released from prison, the PLRA exhaustion defense no longer applies to him.

7 **A. Exhaustion**

8 Failure to exhaust under the Prison Litigation Reform Act ("PLRA") requires that before
 9 bringing a § 1983 action, a prisoner must exhaust all available administrative remedies. 42 U.S.C.
 10 § 1997(e)(a). Exhaustion must be proper, meaning that the prisoner must proceed through each
 11 step of the prison's grievance procedure. Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009)
 12 (citing Woodford v. Ngo, 548 U.S. 81, 93 (2006)). The requirements for proper exhaustion under
 13 the PLRA depends on the applicable grievance procedure of each individual prison. Jones v. Bock,
 14 549 U.S. 199, 218 (2007).

15 Failure to exhaust is an affirmative defense and defendants bear the burden of proving
 16 it. Id. at 218. If the defendants do so, then the burden shifts to the inmate to show "there is
 17 something in his particular case that made the existing and generally available administrative
 18 remedies effectively unavailable to him by showing that the local remedies were ineffective,
 19 unobtainable, unduly prolonged, inadequate, or obviously futile." Williams v. Paramo, 775 F.3d
 20 1182, 1191 (9th Cir. 2015) (quotation omitted). As this Court has previously noted, "the intent of
 21 the exhaustion requirement is to place the facility on notice of issues raised by an inmate and not
 22 erect esoteric and irrelevant procedural requirements." Williams v. Allen, No. 2:17-cv-01612-
 23 RFB-DJA, 2020 U.S. Dist. LEXIS 94684, *21, 2020 WL 2798009 (D. Nev. May 29, 2020); see
 24 also Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009) ("The primary purpose of a grievance
 25 is to alert the prison to a problem and facilitate its resolution, not to lay groundwork for
 26 litigation.").

27 The NDOC Defendants argues that Plaintiffs claims are unexhausted as to Nash and Bryan
 28 under AR 740.08-740.10, because Plaintiff only filed an informal first level grievance and did not

1 formally appeal to the second and third levels as required by AR 740.

2 The court finds that Plaintiff has established a genuine dispute of material fact as to whether
3 he filed a first and second level grievance after a response was not timely received, while he was
4 still incarcerated at SCC, through caseworker Narvaez.

5 The Court finds Plaintiff has also established a factual dispute as to the accuracy of
6 Defendant's grievance processing and tracking system and other record keeping and document
7 retention policies related to administrative grievances. It is already clear from the record that
8 Defendants did not retain grievances that were filed by Plaintiff which were denied for a technical
9 deficiency—the failure to attach the first grievance response. Defendants are not entitled to
10 summary judgment on early exhaustion when prison records pertaining to inmate grievances are
11 incomplete. See Kimbro v. Miranda, 735 F. App'x 275, 278 (9th Cir. 2018) (“Where prison
12 officials fail to retain records relating to the filing or processing of an inmate's grievance, the
13 prisoner should be deemed to have exhausted administrative remedies.”).

14 Independent of the above, the Court finds that the first and second level grievance
15 procedures were “effectively unavailable” to Plaintiff. The record reveals that when Plaintiff filed
16 a formal first level grievance appeal on November 28, 2020, he did not receive a response
17 informing him that his First Level Grievance was denied for failure to attach documents until
18 August of 2021. In the Ninth Circuit, an administrative remedy is rendered “effectively
19 unavailable” where an inmate has submitted a first level grievance and received no response for
20 six months, because the prison's failure to respond thwarted the inmate from taking advantage of
21 the grievance system. Fordley v. Lizarraga, 18 F.4th 344, 354–55 (9th Cir. 2021) (“delay in
22 responding to a grievance, *particularly in at time sensitive one*, may demonstrate that no
23 administrative process is in fact available. *Id.* (emphasis in original) (internal quotations omitted).
24 The Court finds that Plaintiff's November 28, 2020, which stated that he had not been receiving
25 adequate medical treatment related to his back injuries, was time sensitive. The Court further finds
26 that the NDOC Defendants failure to provide any response until August of 2021, eight months
27 after the appeal was submitted and seven months after Plaintiff filed the instant lawsuit, rendered
28 the administrative grievance process under AR 740 effectively unavailable.

1 **B. The Effect of Plaintiff's Amended Complaint on the PLRA Exhaustion**
2 **Requirement**

3 When a formerly incarcerated person amends their complaint to cure deficiencies in their
4 original complaint, which was filed while they were a “prisoner” under the PRLA, the amended
5 complaint filed after the Plaintiff’s release supersedes the original and obviates any exhaustion
6 defense under the PLRA. Jackson v. Fong, 870 F.3d 928, 937 (9th Cir. 2017) (“A plaintiff who
7 was a prisoner at the time of filing his suit but was not a prisoner at the time of his operative
8 complaint is not subject to a PLRA exhaustion defense.”).

9 Plaintiff was released from NDOC custody and paroled in January of 2025. Following the
10 Court’s Order granting the Core Civic Defendants’ Motion to Dismiss without prejudice, and
11 granting Plaintiff leave to amend his complaint to cure deficiencies as described by the Court,
12 Plaintiff filed his Amended Complaint on March 7, 2025. The Amended Complaint superseded
13 Plaintiff’s previous complaint, which was filed while he was still a prisoner. Because Plaintiff was
14 no longer a prisoner at the time he filed his operative complaint, he is not subject to a PLRA
15 exhaustion defense. Id. at 936 (“[O]nce a prisoner is no longer in custody, there is nothing to gain
16 by forcing the prisoner through the administrative process.”).

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